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March 16, 2012

BY HAND

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Re: *North American Freight Car Association v. Union Pacific Railroad Company*, STB Docket No. 42119

Dear Ms. Brown:

This letter responds to the patently false accusation by North American Freight Car Association ("NAFCA") that Union Pacific Railroad Company ("UP") revealed confidential dispute resolution communications in this proceeding. As demonstrated below, the information that NAFCA claims was improperly disclosed actually appeared in NAFCA's original complaint in this proceeding, and UP's discussions about that information were based on UP's review of NAFCA's complaint, not the settlement communications that occurred after NAFCA filed its original complaint.[1]

In its rebuttal, filed March 5, 2012, NAFCA falsely claims that UP revealed confidential settlement communications when UP explained in its reply that it had modified the challenged tariff item after NAFCA filed its original complaint to address two concerns that NAFCA had raised: (i) that the tariff item included an indemnity provision; and (ii) that UP appeared to be attempting to disclaim its responsibility to inspect cars under Federal Railroad Administration ("FRA") rules. *See* NAFCA Rebuttal at 13. In fact, UP knew

[1] After NAFCA filed its original complaint, the parties asked the Board to hold the case in abeyance so they could engage in informal discovery and discuss possible resolutions of this matter, including the possibility of engaging in Board-sponsored mediation. *See N. Am. Freight Car Ass'n v. Union Pac. R.R.*, NOR 42119 (STB served June 8, 2010). UP and NAFCA never actually engaged in any Board-sponsored dispute resolution proceedings.

about those two concerns before the parties engaged in any confidential settlement discussions because NAFCA described them in its "Formal Complaint Alleging Unreasonable Practices and Violation of Common Carrier Obligation," filed April 15, 2010.

With regard to the indemnity provision, NAFCA's complaint expressed concern about the provision when it alleged that the item's "indemnification requirements ... are written so broadly as to include not merely indemnification for the costs of cleaning residue from a car, but also for any loss of life, personal injury, or property damage attributable to the 'unsafe' car." Compl. ¶ 15. NAFCA also expressed concern through its allegations that the "indemnification provisions of the Tariff violate Section 11706," that the "UP Tariff requiring indemnification of the carrier is an unreasonable practice where remedies at civil law are available to the carrier to recover from shippers under the law of negligence," and that "UP's Tariff provision imposing no-fault liability on shippers are an unreasonable practice." Compl., Counts III & IV.

With regard to the inspection of railcars under FRA rules, NAFCA's complaint expressed concern about responsibility for inspections when it alleged that the item "seeks to relieve UP of its obligations under Federal Railroad Administration regulations," including regulations that "require railroads to conduct pre-departure inspections of all cars before they depart in a train or are received in interchange." Compl. ¶ 9.

NAFCA also falsely claims that UP revealed settlement communications when UP described NAFCA's apparent position that, once UP moves a car from a customer facility, UP could not hold the customer responsible for the presence of lading residue on the railcar's exterior. *See* NAFCA Rebuttal at 14. Once again, UP's description of NAFCA's position was not based on any settlement communications, but rather on NAFCA's complaint, which alleged that UP should not be allowed to make a shipper responsible for lading residue that UP did not discover until after a car left the shipper's facility. Specifically, NAFCA alleged that UP was trying to shift to shippers the obligation "to thoroughly inspect the cars prior to placement in a train." Compl ¶ 10. It further alleged: "If commodity residue causes unsafe transportation conditions, then UP should inspect for those conditions before moving cars in a train. If UP inspected cars, loaded or empty, before placing them in a train, and found any condition deemed to be 'unsafe,' including residue from prior loads, UP should not move the car," and UP should not be allowed to use the tariff item to "transfer new liability to shippers." Compl. ¶ 14.

In sum, NAFCA's claim that UP revealed confidential settlement communications is entirely false. When UP described in its reply the concerns it tried to address by amending the challenged tariff item and NAFCA's position regarding shippers' responsibility for the lading residue once UP moves a railcar, UP based its descriptions on the allegations in NAFCA's complaint. The Board should disregard NAFCA's intemperate and baseless accusations.

Sincerely,

Michael L. Rosenthal
Counsel for Union Pacific Railroad Company

cc: Andrew P. Goldstein
John M. Cutler, Jr.